Supreme Court, U.S.
FILED
SEP 20 2004
OFFICE OF THE CLERK

(3)

No. 03-1672

IN THE

Supreme Court of the United States

DEPARTMENT OF SOCIAL SERVICES,
STATE OF CONNECTICUT,

Petitioners,

v.

NEAL OSSEN, TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

G. ERIC BRUNSTAD, JR.
Counsel of Record
RHEBA RUTKOWSKI
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2700

Attorneys for Respondent
Neal Ossen, Trustee

QUESTIONS PRESENTED FOR REVIEW

Petitioner presents the following questions for review:

1. Whether, pursuant to 11 U.S.C. § 106(c), a state agency that files a proof of claim against a bankruptcy debtor can be deemed to waive its Eleventh Amendment immunity to a claim of setoff by the debtor when the claim of setoff does not arise out of the same transaction or occurrence as the agency's claim.

2. Whether, pursuant to 11 U.S.C. § 106(c), the filing of a proof of claim against a bankruptcy debtor by one state agency waives the Eleventh Amendment immunity of all state agencies.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Tables of Cited Authorities	iii
Decisions Below	1
Jurisdiction	1
Statement of the Case	1
Argument in Support of Granting the Petition	4
A. Certiorari Should Be Granted To Resolve A Clear Circuit Split On The Important And Recurring Question Of The Scope Of The Waiver Of Sovereign Immunity Under Section 106(c) Of The Bankruptcy Code.	5
B. Certiorari Also Is Warranted To Resolve The Important And Recurring Question Whether A State Agency's Filing Of A Proof Of Claim Waives The State's Sovereign Immunity With Respect To The State And All Its Agencies	9
Conclusion	13

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Page

Arecibo Community Health Care, Inc. v. Puerto Rico, 270 F.3d 17 (1st Cir. 2001), *cert. denied*, 537 U.S. 813 (2002) 6

California Board of Equalization v. Harleston (In re Harleston), 275 B.R. 546 (BAP 9th Cir. 2002), *aff'd*, 331 F.3d 699 (9th Cir. 2003) 7

Doe v. United States (In re Doe), 58 F.3d 494 (9th Cir. 1995) 11

In re Downingtown Indus. & Agriculture Sch., 172 B.R. 813 (Bankr. E.D. Pa. 1994) 12

FSQ, Inc. v. Integrated Health Services, Inc. (In re Integrated Health Services, Inc.), 303 B.R. 577 (Bankr. D. Del. 2003) 8

Gardner v. New Jersey, 329 U.S. 565 (1947) 9, 10

Georgia Dep't of Revenue v. Headrick (In re Burke), 146 F.3d 1313 (11th Cir. 1998), *cert. denied*, 527 U.S. 1043 (1999) 6

Grabscheid v. Michigan Employment Sec. Commission (In re C.J. Rogers, Inc.), 212 B.R. 265 (E.D. Mich. 1997) 7

In re Hughes-Bechtol, Inc., 124 B.R. 1007 (Bankr. S.D. Ohio 1991) 12

Cited Authorities

	Page
Jones v. Yorke (In re Friendship Med. Ctr., Ltd.), 710 F.2d 1297 (7th Cir. 1983)	7
Lazar v. California (In re Lazar), 237 F.3d 967 (9th Cir. 2001)	10
In re Mason, 79 B.R. 786 (Bankr. N.D. Ill. 1987)	12
In re Microage Corp., 288 B.R. 842 (Bankr. D. Ariz. 2003)	8
Rose v. United States Department Education (In re Rose), 215 B.R. 755 (Bankr. W.D. Mo. 1997)	8
Rose v. United States Department of Education (In re Rose), 187 F.3d 926 (8th Cir. 1999)	6
Schlossberg v. Maryland Comptroller of the Treasury (In re Creative Goldsmiths), 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998)	5, 7
Schulman v. California (In re Lazar), 237 F.3d 967 (9th Cir. 2001), *cert. denied*, 534 U.S. 992 (2001)	6, 10
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)	4

Cited Authorities

	Page
Straight v. Wyoming Dep't Transp. (In re Straight), 143 F.3d 1387 (10th Cir. 1998)	11
Tennessee Student Assistance Corp. v. Hood, __, U.S. __ 124 S. Ct. 1905 (2004)	4
Wallach v. New York State Department of Taxation and Finance (In re Bison Heating & Equip., Inc.), 177 B.R. 785 (Bankr. W.D.N.Y. 1995)	12
Wilson v. Georgia Department of Medical Assistance (In re Wilson), 259 B.R. 432 (Bankr. S.D. Ga. 2000)	11
Wyoming Department of Trans. v. Straight (In re Straight), 143 F.3d 1387 (10th Cir. 1998)	7
Zayler v. United States, 279 F. Supp. 2d 805 (E.D. Tex. 2003)	7

STATE CASES

In re Doctors Hosp. of Hyde Park, Inc., No. 02-3254, 2003 WL 21730747 (7th Cir. July 28, 2003)	11

Cited Authorities

Page

UNITED STATES CONSTITUTION

Eleventh Amendment ..... *passim*

FEDERAL STATUTES

11 U.S.C. § 101(27) 12

11 U.S.C. § 106 ..... 6, 7, 11

11 U.S.C. § 106(a) 2, 3

11 U.S.C. § 106(b) 2, 3

11 U.S.C. § 106(c) ..... *passim*

28 U.S.C. § 1254(1) 1

STATE STATUTES

Conn. Gen. Stat. § 17a-228 1

RULES

United States Supreme Court Rule 10(a) 4

OTHER AUTHORITY

Collier on Bankruptcy, § 106.02[3][b] (Lawrence P. King, ed., 15th ed. rev. 2003) 10

DECISIONS BELOW

The opinion of the court of appeals, Pet. App. 2a, is reported at 361 F.3d 760. The opinion of the district court, Pet. App. 21a, is unreported. The opinion of the bankruptcy court, Pet. App. 33a, is reported at 203 B.R. 17.

JURISDICTION

The court of appeals entered its judgment on March 19, 2004. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This matter arises out of the Chapter 7 bankruptcy case of Charter Oak Associates ("Charter Oak"), filed on December 31, 1991 (the "Petition Date"). Pet. App. 35a. Petitioner is the State of Connecticut, Department of Social Services ("DSS"). Respondent is Neal Ossen, chapter 7 trustee of Charter Oak's bankruptcy estate (the "Trustee").

The relevant facts are undisputed. Charter Oak formerly operated group homes for persons with mental disabilities. Pet. App. 35a. Pursuant to Conn. Gen. Stat. § 17a-228, Charter Oak received funding for its operations from the State of Connecticut (the "State"). After the Petition Date, DSS determined that the State owed Charter Oak $225,309.29 in withheld payments but refused to pay this money to Charter Oak. Pet. App. 35a-36a.

During the bankruptcy case, the State, acting through its Department of Revenue Services ("DRS"), filed a proof of claim against Charter Oak in the amount of $148,643.34,

alleging that Charter Oak failed to pay certain use taxes associated with its operation of the group homes. Pet. App. 3a.

On or about May 16, 1996, the Trustee filed a Second Amended Complaint (the "Complaint") in the bankruptcy court, seeking to recover the $225,309.29 that the State owed to Charter Oak. Pet. App. 35a. On or about July 15, 1996, the State moved to dismiss the Complaint on the ground that the bankruptcy court lacked jurisdiction to enter a money judgment against the State owing to the State's sovereign immunity.

First, the State argued that 11 U.S.C. § 106(a), which prescribes the abrogation of a State's sovereign immunity with respect to the application of certain provisions of the Bankruptcy Code, is unconstitutional. Pet. App. 37a. Second, the State argued that it had not waived its sovereign immunity by filing its proof of claim. *Id.*

In response, the Trustee did not contest the State's first assertion concerning section 106(a). Pet. App. 37a. With regard to the question of waiver, however, the Trustee argued that the bankruptcy court could proceed under sections 106(b) or 106(c). Section 106(b) provides, in pertinent part, that "[a] governmental unit that has filed a proof of claim . . . is deemed to have waived sovereign immunity with respect to a claim against such governmental unit . . . that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b). Section 106(c) provides that "[n]otwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the [bankruptcy] estate." 11 U.S.C. § 106(c).

On November 25, 1996, the bankruptcy court concluded that it could not proceed under section 106(b) because the Trustee's claim against the State did not arise out of the same transaction or occurrence as the State's claim against the Trustee. Pet. App. 45a. Nevertheless, the court denied the State's motion to dismiss because the court concluded that it had jurisdiction to proceed under section 106(c) to determine whether the Trustee's claim against DSS could be offset against DRS's claim. The court reasoned that DRS's filing of its proof of claim waived the State's sovereign immunity for purposes of setoff. Pet. App. 47a. Specifically, the court determined that the Trustee's claim "clearly qualifies as a setoff or a permissive counterclaim to the defendant's proof of claim." Pet. App. 46a.

DSS appealed the decision to the district court. Pet. App. 23a-30a.[1] On September 30, 2002, the district court affirmed, holding that the bankruptcy court had jurisdiction under section 106(c) of the Bankruptcy Code to determine the setoff issue. Pet. App. 24a-32a.

On March 19, 2004, the court of appeals entered the decision below, affirming the district court's ruling that the Trustee could, consistent with the Eleventh Amendment and section 106(c) of the Bankruptcy Code, assert Charter Oak's claim against DSS to offset the State's tax claim against the bankruptcy estate. Pet. App. 17a-20a. The court of appeals expressly did not determine whether section 106(a) of the Code validly abrogates state sovereign immunity or whether the Trustee's claim meets the requirements of section 106(b). Pet. App. 5a-6a; Pet. App. 9a.

---

1. As the Second Circuit noted in its decision below, the Trustee could not have appealed the bankruptcy court's rulings concerning sections 106(a) and 106(b), favoring the State's invocation of sovereign immunity, because these rulings were not immediately appealable. Pet. App. 6a n.2.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The Trustee obviously views the merits of the questions presented differently than does the State. The Trustee nevertheless takes the position that the Court should grant certiorari in the instant matter because the question of the extent to which Eleventh Amendment immunity is waived, pursuant to section 106(c) of the Bankruptcy Code, when a state or state agency files a proof of claim is an important and recurring question as to which the courts of appeals have rendered conflicting decisions. *See* Supreme Court Rule 10(a). Certiorari also is warranted to resolve the important and recurring question whether a state agency's filing of a proof of claim waives the state's sovereign immunity with regard to the State and all its agencies — an issue over which the lower courts are divided. *See* Supreme Court Rule 10(a).[2]

---

2. The issues in this case are not resolved or addressed by the Court's recent decision in *Tennessee Student Assistance Corp. v. Hood*, __ U.S. __, 124 S. Ct. 1905 (2004). In that case, the Court specifically noted that "Hood does not argue in this Court that TSAC waived its sovereign immunity, and we pass no judgment on the question." 124 S. Ct. at 1909 n.3. The issue resolved in *Hood* was whether a proceeding in bankruptcy to determine the dischargeability of a debt to a state ran afoul of the state's sovereign immunity. As the Court indicated in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the issue of a state's waiver of sovereign immunity is distinct from the question whether a state's sovereign immunity is offended by a particular type of proceeding in federal court. 517 U.S. at 65 (noting "the unremarkable, and completely unrelated, proposition that the States may waive their sovereign immunity").

A. Certiorari Should Be Granted To Resolve A Clear Circuit Split On The Important And Recurring Question Of The Scope Of The Waiver of Sovereign Immunity Under Section 106(c) Of The Bankruptcy Code.

The compelling need for this Court to resolve the question of the scope of the waiver of sovereign immunity under section 106(c) of the Bankruptcy Code is highlighted by the clear circuit split on this issue between the Second Circuit's decision in this case and the decision of the Fourth Circuit in *Schlossberg v. Maryland Comptroller of the Treasury (In re Creative Goldsmiths)*, 119 F.3d 1140 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998).

The Second Circuit held in this case that "the Eleventh Amendment permits the assertion by a debtor of *permissive* counterclaims that are capped by a setoff limitation against a state that has filed a proof of claim." Pet. App. 15a (emphasis supplied). In contrast, the Fourth Circuit held in *Schlossberg* that a state waives Eleventh Amendment immunity in a state-instituted federal action only with respect to assertions that "amount to a *compulsory* counterclaim." 119 F.3d at 1148 (emphasis supplied). The Second Circuit recognized this split of authority, stating:

> We note that the only other circuit to have considered this issue has arrived at the opposite conclusion. Relying on Supreme Court precedent establishing that waivers of sovereign immunity are to be "narrowly construed," the Fourth Circuit has held that the Eleventh Amendment permits only *compulsory* counterclaims to be asserted against the state in these circumstances. . . .

> We are not convinced by the Fourth Circuit's reasoning. . . . In sum, we decline to adopt the Fourth Circuit's reasoning and we hold that § 106(c) is a permissible codification of the waiver-by-litigation doctrine.

Pet. App. 15a-16a.

The uncertainty surrounding the scope of the waiver of sovereign immunity under section 106 of the Bankruptcy Code is reflected in numerous decisions of the courts of appeal. *See Arecibo Cmty. Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001) (holding that the Bankruptcy Code validly waives a state's Eleventh Amendment immunity with respect to compulsory counterclaims, "even though they could require affirmative recovery from the state"), *cert. denied*, 537 U.S. 813 (2002); *Schulman v. California (In re Lazar)*, 237 F.3d 967, 977-78 (9th Cir. 2001) (stating that "the extent to which filing a proof of claim constitutes waiver of Eleventh Amendment immunity is uncertain" but holding that "when a state or an 'arm of the state' files a proof of claim in a bankruptcy proceeding, the state waives its Eleventh Amendment immunity with regard to the bankruptcy estate's claims that arise from the same transaction or occurrence as the state's claim") (internal quotation marks and citations omitted), *cert. denied*, 534 U.S. 992 (2001); *Rose v. United States Dep't of Educ. (In re Rose)*, 187 F.3d 926, 930 (8th Cir. 1999) (deciding that a state agency had waived its Eleventh Amendment immunity but declining to reach issues concerning "the constitutionality of the abrogation provision of § 106(a) and the statutory waiver provision of § 106(b)"); *Georgia Dep't of Revenue v. Headrick (In re Burke)*, 146 F.3d 1313, 1320 n.13 (11th Cir. 1998) (declining to "address whether the scope of the State's

waiver of Eleventh Amendment immunity extends to the full scope indicated by the Fourth Circuit in [*Schlossberg*]"), *cert. denied*, 527 U.S. 1043 (1999); *Wyoming Dep't of Trans. v. Straight (In re Straight)*, 143 F.3d 1387, 1390 (10th Cir. 1998) (holding that a state's Eleventh Amendment immunity is waived but only to permit a debtor to proceed against "claims asserted by the state that arose out of the same transaction or occurrence as a claim previously filed by the state in the bankruptcy estate"); *Jones v. Yorke (In re Friendship Med. Ctr., Ltd.)*, 710 F.2d 1297, 1301 (7th Cir. 1983) (limiting waiver of immunity to those matters "arising out of the same transaction or occurrence which is the subject matter of the suit," and declining to extend waiver to permissive counterclaims, i.e. "claims for affirmative relief in excess of or different in kind from that sought by the plaintiff").

The confusion concerning this issue is also evident in decisions of the district courts, bankruptcy appellate panels, and bankruptcy courts. *See Zayler v. United States*, 279 F. Supp. 2d 805, 811 (E.D. Tex. 2003) (holding that, in filing a proof of claim, a state waives sovereign immunity as to compulsory counterclaims arising out of the same transaction or occurrence under § 106(b)); *California Bd. of Equalization v. Harleston (In re Harleston)*, 275 B.R. 546, 550-51 (B.A.P. 9th Cir. 2002) (holding that, in filing a proof of claim, a state's waiver of immunity extends to ancillary claims that seek affirmative relief such that the debtor's adversary proceeding to determine dischargeability could proceed), *aff'd*, 331 F.3d 699 (9th Cir. 2003); *Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.)*, 212 B.R. 265, 271-74 (E.D. Mich. 1997) (holding that waiver of sovereign immunity under § 106 constitutes an invalid abrogation of a state's Eleventh Amendment immunity and

restricting a state's waiver of its immunity in filing a proof of claim to "the adjudication of that particular claim"); *FSQ, Inc. v. Integrated Health Servs., Inc. (In re Integrated Health Servs., Inc.)*, 303 B.R. 577, 582-83 (Bankr. D. Del. 2003) (limiting waiver of sovereign immunity under § 106 to compulsory counterclaims that arose out of the same transaction or occurrence that are property of the estate and, thus, declining to extend waiver to include tortious interference claims asserted by a third party); *In re Microage Corp.* , 288 B.R. 842, 853-54 (Bankr. D. Ariz. 2003) (holding that a state waives immunity with respect to setoffs, pursuant to § 106(c), when it files a proof of claim); *Rose v. United States Dep't Educ. (In re Rose)*, 215 B.R. 755, 758 & 761-62 (Bankr. W.D. Mo. 1997), *aff'd in part and remanded by*, 227 B.R. 518 (W.D. Mo. 1998) (holding that, while it agreed with "the reasoning of the recent cases which have held that § 106(b) must be found to be unconstitutional to the extent it attempts to dictate the circumstances constituting a waiver of immunity on the part of a state," the state agency waived its Eleventh Amendment immunity as to the adjudication of the claims asserted in its proof of claim), *aff'd in part and remanded in part by*, 187 F.3d 926 (8th Cir. 1999).

It seems highly unlikely that the lower courts will resolve this conflict without the intervention of this Court. Moreover, this case presents an ideal vehicle for resolution of the issue. The question whether a state waives its sovereign immunity with respect to setoffs under section 106(c) of the Bankruptcy Code by filing a proof of claim is presented simply and clearly and is outcome determinative. If the Trustee is permitted to take his setoff, the setoff will reduce the State's claim against the bankruptcy estate and the State's ability to obtain distributions from the estate. In contrast, if the Trustee is not permitted to take his setoff, then the State's claim may not

be reduced and it may receive distributions on its claim. Moreover, the issue is one that arises frequently in the administration of bankruptcy proceedings. States often file proofs of claim and trustees often assert rights of setoff. Thus, resolution of the split of authority on the question presented is imperative to the efficient administration of bankruptcy cases.

In sum, the Court should grant certiorari in the instant matter to resolve a clear circuit split concerning the important and recurring question of the extent to which Eleventh Amendment immunity is waived under section 106(c) of the Bankruptcy Code when a state or state agency files a proof of claim in a bankruptcy case.

B. Certiorari Also Is Warranted To Resolve The Important And Recurring Question Whether A State Agency's Filing Of A Proof Of Claim Waives The State's Sovereign Immunity With Respect To The State And All Its Agencies.

Certiorari also is warranted to resolve the important and recurring question whether a state agency's filing of a proof of claim waives the state's sovereign immunity as to the state and all its agencies, a question left open by this Court's decision in *Gardner v. New Jersey*, 329 U.S. 565 (1947).

In *Gardner*, the Court held that, when a state files a proof of claim against a debtor's bankruptcy estate, "it waives any immunity it otherwise might have had respecting the adjudication of the claim." 329 U.S. at 574. As the Second Circuit noted in the decision below, however,

> [u]nanswered by *Gardner* is whether [filing a proof of claim] waives immunity with respect to

> all claims against the state, whether it waives immunity with respect to only some claims and not others, or whether it just prevents the state from asserting its immunity in response to objections lodged against its claim (as in *Gardner* itself).

See Pet. App. 12a (citing *Gardner*). *See also Schulman v. California (In re Lazar)*, 237 F.3d 967, 977 (9th Cir. 2001) (recognizing that "the extent to which filing a proof of claim constitutes waiver of Eleventh Amendment immunity is uncertain") (internal quotation marks and citations omitted); *Collier on Bankruptcy*, § 106.02[3][b] (Lawrence P. King, ed., 15th ed. rev. 2003) ("The Supreme Court has not yet clarified whether the state's waiver by filing a proof of claim extends [beyond its holding in *Gardner*], and the lower courts that have addressed the question have reached different conclusions.").

The Second Circuit held in the decision below that the State of Connecticut, like the federal government, acts as a "unitary creditor" for non-bankruptcy purposes and should be treated as such in bankruptcy as well. Pet. App. 18a-20a. Thus, when DRS filed its proof of claim on behalf of the State, it waived the State's sovereign immunity in connection with the Trustee's claim against DSS for purposes of setoff. Pet. App. 20a.

The Second Circuit's ruling on this point is supported by decisions of at least two other courts of appeals — the Ninth Circuit and the Tenth Circuit. *See Lazar v. California (In re Lazar)*, 237 F.3d 967, 979-80 (9th Cir. 2001) (holding that, because the California State Board of Equalization filed proofs of claims in the debtors' bankruptcy case that were

logically related to the Trustee's claims against the California State Water Resources Control Board ("State Board") in a mandamus adversary proceeding, the State Board had waived its Eleventh Amendment immunity in the mandamus adversary proceeding); *Doe v. United States (In re Doe)*, 58 F.3d 494, 498 (9th Cir. 1995) (holding "that as a matter of law, for purposes of waiver of sovereign immunity and setoff under 11 U.S.C. § 106, all agencies of the United States, except those acting in some distinctive private capacity, are a single governmental unit" and that should Doe prevail against the FBI on his tort claims, the IRS's claims against the bankruptcy estate may be reduced by the liquidated amount of Doe's tort judgment); *Straight v. Wyoming Dep't Transp. (In re Straight)*, 143 F.3d 1387, 1391 (10th Cir. 1998) ("We are convinced that the State of Wyoming is not an amalgam of separate, independent, and self-sustaining branches. Like the federal government, in bankruptcy it should be regarded as one unified entity with different arms through which it carries out the affairs of the state."). *See also In re Doctors Hosp. of Hyde Park, Inc.*, No. 02-3254, 2003 WL 21730747 (7th Cir. July 28, 2003) (allowing one state agency to deduct taxes owed by debtor from money that another state agency owned to assignee of debtor) (unpublished).

The Second Circuit's decision on this point also is supported by the decisions of at least five different bankruptcy courts. *See Wilson v. Georgia Dep't of Med. Assistance (In re Wilson)*, 259 B.R. 432, 438 (Bankr. S.D. Ga. 2000) (defining broadly a "governmental unit" so as to incorporate "all of the agencies acting on a state's behalf," and holding that "[i]n the case at bar, the Department of Medical Assistance and the Department of Revenue are agencies of the State of Georgia and clearly fall within the definition of

a governmental unit under Section 106(b)"); *Wallach v. New York State Dep't of Taxation & Fin. (In re Bison Heating & Equip., Inc.)*, 177 B.R. 785, 791 (Bankr. W.D.N.Y. 1995) (treating the New York State Department of Taxation and Finance and the New York State Department of Labor as a single entity for setoff purposes under section 106); *In re Downingtown Indus. & Agric. Sch.*, 172 B.R. 813, 822 (Bankr. E.D. Pa. 1994) ("[W]henever an agent or agency of a state files a proof of claim in a debtor's bankruptcy case, that agent or agency has waived the state's sovereign immunity."); *In re Hughes-Bechtol, Inc.*, 124 B.R. 1007, 1017 (Bankr. S.D. Ohio 1991) ("Defendants here have no viable Eleventh Amendment defense because at least one agency of the Commonwealth of Pennsylvania, i.e. , the Department of Revenue, has filed a proof of claim in this bankruptcy case. Eleventh Amendment immunity applies to the *states*, and through them to their agencies. A state may not selectively waive its immunity."); *In re Mason*, 79 B.R. 786, 788 (Bankr. N.D. Ill. 1987) (allowing state scholarship commission to assert a setoff right against the debtor's federal tax refunds, which had been turned over by the IRS to the state department of education).

Petitioner argues that the filing of a proof of claim by one state agency should not operate as a waiver of sovereign immunity as to other state agencies or the state as a whole and that, for purposes of § 106(c), each state agency should be considered a separate governmental unit, as that term is defined in 11 U.S.C. § 101(27). Pet. App. 17-18. In support of this argument, Petitioner cites one district court decision and three bankruptcy court decisions. Pet. App. 18 (collecting cases).

The question whether, by filing a proof of claim, one agency of a state waives the state's sovereign immunity with respect to the state and all its agencies is presented simply and clearly in this case and also is outcome determinative. Moreover, the issue is one that arises frequently in the administration of bankruptcy proceedings. Given the evident confusion of the lower courts, certiorari is warranted to review the Second Circuit's ruling on the important and recurring question whether a state agency's filing of a proof of claim waives the state's sovereign immunity as to the state and all its agencies.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to review the decision of the court of appeals in this case.

Respectfully submitted,

G. ERIC BRUNSTAD, JR.
Counsel of Record
RHEBA RUTKOWSKI
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, CT 06103
(860) 240-2700

Attorneys for Respondent
Neal Ossen, Trustee